STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 30, 2000
v	No. 215237 Chippewa Circuit Court
DON GENE MILLER, Defendant-Appellant.	LC No. 97-006540-FH

Before: Hood, P.J., and Saad and O'Connell, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of prisoner in possession of a weapon, MCL 800.823(4); MSA 28.1623(4). He was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to twenty to forty years' imprisonment and appeals as of right. We affirm.

In 1979, defendant was convicted, following a jury trial in Eaton County, of two counts of assault with intent to commit murder and one count of first-degree criminal sexual conduct. Defendant was sentenced to three concurrent terms of thirty to fifty years' imprisonment. Later in 1979, defendant pleaded guilty but mentally ill in Ingham County to two counts of manslaughter. Defendant's plea agreement was offered in exchange for his cooperation with police to identify the location of the remains of three of defendant's four homicide victims.

In 1994, a routine search of defendant's three-person cell occurred. Defendant's foot locker was padlocked inside of his wall locker. Once the foot locker was opened, a small box was recovered. There was velvet lining inside the box, but nothing was found on top of the lining. A corrections officer removed the lining and observed several small items, a cross, and a plastic package with an article rolled up inside. Inside the plastic package, the officer found a heavy six-foot shoelace with two large wooden buttons attached that had been tied with a large knot. The officer thought that the object could be used to strangle someone and reported the find as a weapon. The Department of Corrections handled the matter administratively as a major misconduct and did not report the alleged weapon to the state police or the county prosecutor. In 1997, the Chippewa County prosecutor charged defendant with being a prisoner in possession of a weapon. At trial, the local prosecutor was assisted by prosecutors from Ingham and Eaton Counties.

Defendant first argues that the convicted offense constituted selective prosecution by three prosecutors acting in concert to preclude defendant's parole. We disagree. We review a charging decision under the "abuse of power" standard. *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996). The prosecutor has discretion to decide whether to initiate criminal charges and the appropriate charge to bring lies in the discretion of the prosecutor. *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998). The discretion over what charges to file will not be disturbed absent a showing of clear and intentional discrimination based on an unjustifiable standard such as race, religion, or some other arbitrary classification. *In re Hawley*, 238 Mich App 509, 512; 606 NW2d 50 (1999). To establish intentional and purposeful discrimination, it must be shown that the defendants were "singled" out for prosecution while similarly situated individuals were not prosecuted for the same conduct. *People v Ford*, 417 Mich 66, 102; 331 NW2d 878 (1982). The defendant must also establish that the discriminatory selection in prosecution was based on an impermissible ground such as race, sex, religion, or the exercise of a fundamental right. *Id*. Defendant has failed to present any evidence that he was singled out for prosecution when others similarly situated were not prosecuted for the same conduct. Furthermore, defendant has failed to establish that eligibility for parole places him in a class afforded protection from selective prosecution. Accordingly, defendant's claim of selective prosecution fails.[1]

Defendant next argues that he was denied due process of law when the prosecution for the convicted offense violated the terms of defendant's plea bargain entered into in 1979, and usurped the authority of the parole board. This argument is without merit. Our review is limited to the record on appeal, *People v Canter*, 197 Mich App 550, 557; 496 NW2d 336 (1992), and the terms of the plea agreement were not preserved in the lower court record. Accordingly, we cannot conclude and cast doubt on any contention that defendant's plea agreement precluded prosecution for the commission of any future crimes.[2] Furthermore, the subsequent prosecution for this offense did not usurp the authority of the parole board. There is no constitutional or inherent right to be conditionally released prior to the expiration of a valid sentence. *Greenholtz v Nebraska Penal Inmates*, 442 US 1, 7; 99 S Ct 2100; 60 L Ed 2d 668 (1979). Defendant cannot demonstrate that he would have been paroled but for this prosecution. It is alleged that defendant has been eligible for parole since 1989. According to the pre-sentence investigation report, defendant has been denied parole seven times. Furthermore, there is no entitlement to parole after the commission of another offense while in prison.

Defendant next argues that the prisoner in possession of a weapon statute, MCL 800.823(4); MSA 28.1623(4), is vague and overbroad. We disagree. This Court has examined the constitutionality of the statute and determined that it is not vague or overbroad. *People v Osuna*, 174 Mich App 530, 531-532; 436 NW2d 405 (1988); *People v Herron*, 68 Mich App 381, 383-384; 242 NW2d 584 (1976).

Defendant next argues that an alleged communication between a former inmate of defendant's and a juror creates an issue regarding improper external influence for which an evidentiary hearing is required. We disagree. Jurors may only consider the evidence that is presented to them in open court during their deliberations, and the consideration of extraneous facts not introduced in evidence deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel. *People v*

Budzyn, 456 Mich 77, 88; 566 NW2d 229 (1997). In order to establish that the extrinsic influence was error requiring reversal, the defendant must first prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. *Id*. at 88-89. Once the defendant meets his initial burden, the people must demonstrate that the error was harmless beyond a reasonable doubt. *Id*. at 89. In the present case, defendant has failed to prove that the jury was exposed to extraneous influences. Former inmate Jeffrey Adkins claimed that he discussed defendant's criminal history with juror, Walter Kayden, who denied that any discussion took place. Irrespective of whether the discussion took place, the remaining jurors denied that any information was conveyed to them by Kayden. Accordingly, defendant failed to satisfy his burden of proof regarding extraneous facts, and an evidentiary hearing is not warranted under the circumstances. *Budzyn, supra*.

Defendant next argues that there was insufficient evidence to sustain a conviction of prisoner in possession of a weapon, MCL 800.283(4); MSA 28.1634(4). We disagree. When examining the sufficiency of the evidence, we review all the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the elements of the charged offense had been proved beyond a reasonable doubt. *People v Ortiz-Kehoe*, 237 Mich App 508, 520; 603 NW2d 802 (1999). MCL 800.283(4); MSA 28.1623(4) provides:

> Unless authorized by the chief administrator of the correctional facility, a prisoner shall not have in his or her possession or under his or her control a weapon or other implement which may be used to injure a prisoner or other person, or to assist a prisoner to escape from imprisonment.

Defendant disputes the prosecutor's proofs regarding authorization of the shoelace because it was sold in the prison store and also worn by inmates as a necklace. However, Warden Arthur Tessmer testified that over two hundred items are available in the prison store. Tessmer testified that socks and combination locks were available for sale and authorized for inmate use. However, the placement of a combination lock inside of a sock constituted dangerous contraband and was a serious offense in prison. Tessmer also testified that while shoelaces were available for sale and could be possessed by inmates, the modification of the shoelace by adding buttons was not authorized on the date of the offense. In *Acrey v Dep't of Corrections*, 152 Mich App 554, 559; 394 NW2d 415 (1986), we held that the element that transforms an unauthorized article into a weapon is its potential to cause injury. The prosecution presented expert testimony to establish that the shoelace and buttons could be used as a ligature weapon to strangle an individual. Viewing this evidence in the light most favorable to the prosecutor, a rational trier of fact could find that the device as modified by defendant was not authorized by prison officials. *Ortiz-Kehoe, supra*.

Lastly, defendant argues that the trial court abused its discretion in sentencing him as a fourth habitual offender to twenty to forty years' imprisonment because the sentence was not individualized, the sentence took into account offenses for which defendant was not convicted, and the sentence violated the principle of proportionality. We disagree. Our review of the record reveals that the trial court did not take into account any impermissible factors and considered the goals of sentencing - punishment, protection of society, reformation of the offender, and deterrence of others - when

fashioning defendant's sentence. *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999). Furthermore, the court may consider the defendant's criminal history and other criminal activities to which the defendant admits. *People v Fleming*, 428 Mich 408, 417-418; 410 NW2d 266 (1987). Finally, the trial court did not abuse its discretion in sentencing defendant. A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). When an habitual offender's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the law, a sentence within the statutory limits is proportionate. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). Here, the court had the discretion to sentence defendant to any term of years or life imprisonment as a fourth habitual offender. Considering that defendant had strangled three of his four homicide victims and had attempted to strangle one of his assault victims, his possession of an object that could be used as a strangulation device heightened the seriousness of this matter. Defendant's sentence is proportionate.

Affirmed.

/s/ Harold Hood
/s/ Henry William Saad
/s/ Peter D. O'Connell

[1] Defendant also insinuates that his prosecution was improper based on the unique factual circumstances presented. Although the offense occurred on November 4, 1994, defendant was not arrested for the convicted offense until July 25, 1997. Additionally, while the prosecution was initiated by Chippewa County, prosecutors from both Ingham and Eaton Counties joined in the prosecution. MCL 767.24; MSA 28.964 provides that the indictment for the charge of prisoner in possession of a weapon must be filed within six years of the commission of the offense. The prosecutor complied with this limitation on prosecution. Furthermore, the prosecutor explained that that any delay in bringing the indictment was due to the mistaken belief that the contraband that defendant had been found with was drugs. Once the prosecutor learned that the item found was a strangulation weapon, the decision to file charges was made. Finally, we see no distinction between the Chippewa County Prosecutor's decision to involve prosecutors from two other counties as opposed to assigning three of his own prosecutors to this case. The decision regarding the amount of manpower needed to prosecute this action and the location from which the manpower would be drawn is insufficient for us to conclude that the prosecutor engaged in selective prosecution.

[2] We note that the plea agreement was submitted as an appendix to the prosecutor's brief on appeal. This constitutes an inappropriate expansion of the record on appeal. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). For purposes of completeness, we have examined the plea agreement and note that it does not contain any provision addressing immunity from prosecution for future crimes.